



OFFICE of the ATTORNEY GENERAL
GREG ABBOTT

December 27, 2002

Mr. David Anderson
General Counsel
Texas Education Agency
1701 N. Congress Avenue
Austin, Texas 78701-1494

OR2002-7401

Dear Mr. Anderson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 174176.

The Texas Education Agency (the "agency") received a request for "the Oak Hill Technology, Inc. [("OHT")] proposal for special education monitoring and any subsequent contracts that were issued for services provided." You state that the release of the requested information may implicate the proprietary rights of OHT. Consequently, you notified OHT of the request for information under section 552.305 of the Government Code. Although you do not take a position with regard to the disclosure of the requested information, OHT has submitted briefing to this office in which it contends that the requested information is excepted from disclosure under sections 552.101, 552.104 and 552.110 of the Government Code. We have considered OHT's claimed exceptions and reviewed the submitted information.

Initially, we note that the submitted documents contain information that is subject to required public disclosure under section 552.022 of the Government Code, which provides in relevant part:

(a) Without limiting the amount or kind of information that is public information under this chapter, *the following categories of information are public information and not excepted from required disclosure under this chapter unless they are expressly confidential under other law:*

(3) information in an account, voucher, or contract relating to the receipt or expenditure of public or other funds by a governmental body[.]

Gov't Code § 552.022(a)(3) (emphasis added). The submitted contracts relate to the receipt or expenditure of public funds. Therefore, as prescribed by section 552.022, such information must be released unless it is confidential under other law. Section 552.104 is a discretionary exception and not "other law" for the purposes of section 552.022.¹ However, as section 552.101 is considered other law for purposes of section 552.022, we will address your arguments under this section for the submitted contracts as well as the proposal.

OHT argues that the submitted information is made confidential by section 552.101 in conjunction with *National Parks & Conservation Ass'n v. Morton*, 498 F.2d 765 (D.C. cir. 1974). Section 552.101 of the Government Code excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision." *National Parks* concerns the test for applying section 552(b)(4) of the federal Freedom of Information Act. That case is not a judicial decision that makes confidential the requested information under the Public Information Act (the "Act"). See *Birnbaum v. Alliance of Am. Insurers*, 994 S.W.2d 766, 776 (Tex. App.--Austin 1999, pet. denied). Therefore, you may not withhold any of the submitted information based on section 552.101 in conjunction with *National Parks*.

We next address OHT's arguments under section 552.104. Section 552.104 excepts information from disclosure if a governmental body demonstrates that the release of the information would cause potential specific harm to its interests in a particular competitive situation. See Open Records Decision Nos. 593 at 2 (1991), 463 (1987), 453 at 3 (1986). Section 552.104 protects the interests of governmental bodies, not third parties. Open Records Decision No. 592 (1991). As the agency does not raise section 552.104, this section is not applicable to the requested information. *Id.* (Section 552.104 may be waived by governmental body). Thus, the agency may not withhold information pertaining to OHT under section 552.104.

We turn now to OHT's arguments under section 552.110. Section 552.110 protects the property interests of private persons by excepting from disclosure two types of information: (1) trade secrets obtained from a person and privileged or confidential by statute or judicial decision and (2) commercial or financial information for which it is demonstrated based on specific factual evidence that disclosure would cause substantial competitive harm to the person from whom the information was obtained. With respect to the trade secret prong of section 552.110, we note that the Texas Supreme Court has adopted the definition of trade secret from section 757 of the Restatement of Torts. *Hyde Corp. v. Huffines*, 314 S.W.2d

¹Discretionary exceptions are intended to protect only the interests of the governmental body, as distinct from exceptions which are intended to protect information deemed confidential by law or the interests of third parties. See, e.g., Open Records Decision No. 592 at 8 (1991) (governmental body may waive section 552.104, information relating to competition or bidding), 522 at 4 (1989) (discretionary exceptions in general). Discretionary exceptions therefore do not constitute "other law" that makes information confidential.

763 (Tex.), *cert. denied*, 358 U.S. 898 (1958); *see also* Open Records Decision No. 552 at 2 (1990). Section 757 provides that a trade secret is:

any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for a chemical compound, a process of manufacturing, treating or preserving materials, a pattern for a machine or other device, or a list of customers. It differs from other secret information in a business . . . in that it is not simply information as to single or ephemeral events in the conduct of the business A trade secret is a process or device for continuous use in the operation of the business. . . . [It may] relate to the sale of goods or to other operations in the business, such as a code for determining discounts, rebates or other concessions in a price list or catalogue, or a list of specialized customers, or a method of bookkeeping or other office management.

RESTATEMENT OF TORTS § 757 cmt. b (1939). In determining whether particular information constitutes a trade secret, this office considers the Restatement's definition of trade secret as well as the Restatement's list of six trade secret factors. RESTATEMENT OF TORTS § 757 cmt. b (1939).² This office has held that if a governmental body takes no position with regard to the application of the trade secret branch of section 552.110 to requested information, we must accept a private person's claim for exception as valid under that branch if that person establishes a *prima facie* case for exception and no argument is submitted that rebuts the claim as a matter of law. Open Records Decision No. 552 at 5-6 (1990). With respect to the commercial and financial information prong of section 552.110, we note that the exception requires a specific factual or evidentiary showing, not conclusory or generalized allegations, that substantial competitive injury would result from disclosure. Gov't Code § 552.110(b); *see* Open Records Decision No. 661 (1999).

²The six factors that the Restatement gives as indicia of whether information constitutes a trade secret are:

- (1) the extent to which the information is known outside of [the company]; (2) the extent to which it is known by employees and others involved in [the company's] business;
- (3) the extent of measures taken by [the company] to guard the secrecy of the information;
- (4) the value of the information to [the company] and [its] competitors; (5) the amount of effort or money expended by [the company] in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

RESTATEMENT OF TORTS § 757 cmt. b (1939); *see also* Open Records Decision Nos. 319 at 2 (1982), 306 at 2 (1982), 255 at 2 (1980).

OHT contends that the submitted Proposal and portions of certain contracts are excepted from disclosure under section 552.110(a). Upon review of the submitted information and OHT's arguments in support of its trade secret claim, we do not believe that OST has established a *prima facie* case that the submitted information constitutes trade secrets. Additionally, we find that OHT has not adequately demonstrated how the release of the information would cause OHT substantial competitive harm. Therefore, the submitted information may not be withheld under section 552.110(a) or (b), and it must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.* § 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

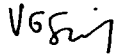
If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at 877/673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Department of Public Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.--Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at 512/475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



V.G. Schimmel
Assistant Attorney General
Open Records Division

VGS/lmt

Ref: ID# 174176

Enc: Submitted documents

c: Ms. Samantha Martin
3000 Crickett Drive
Plano, Texas 75023
(w/o enclosures)